ORIGINAL (1)

No. 01 10303

Supreme Court, U.S.
FILED
MAY 16 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

~~Doris Neill Mozley~~ — PETITIONER
(Your Name)

vs.

Commissioner of Internal Revenue — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Doris Neill Mozley
(Your Name)

612 West Franklin Street
(Address)

Richmond, Virginia 23220
(City, State, Zip Code)

804 644 2776
(Phone Number)

44 pp
10

QUESTION(S) PRESENTED

1. Whether or not the military retirement payments that Petitioner received during the years at issue incident to her divorce were in the nature of alimony (taxable income to Petitioner), or in the nature of a property division and settlement (not taxable income to Petitioner.)

2. Whether or not the Fourth Circuit erred in refusing to grant a rehearing and oral argument on Petitioner's appeal from the Tax Court.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 7

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 17

INDEX TO APPENDICES

Appendix A: Denial of Rehearing by United States Court of Appeals for the Fourth Circuit..

Appendix B: Opinion of the United States Court of Appeals for the Fourth Circuit.

Appendix C: Memorandum Findings of Fact and Opinion of the United States Tax Court.

TABLE OF AUTHORITIES CITED

CASES

		Page
Balding v. Commissioner	Docket No 10108 TC 368 Filed March 31, 1992	15
Beard v. Commissioner	77 T.C.1275 (1981)	11
Boucher v. Commissioner	710 F. 2d 507 (9th Cir. 1983)	8
Eatinger v. Commissioner	T.C. Memo 1990-110	15
Ficchi v. Commissioner	T.C. Memo 1986-191	9
Hesse v.Commissioner	60 T.C. 685, 691, (1973)	7
Hoover v. Commissioner	102 F. 3d 842, 844-845 (6th Cir. 1996, affg. Tax Memo. 1995-183.	7
Hoolapa v. Hoolapa,	105 N.C. App. 230, 412 S.E. 2d 112 (Ct. of App. 1992)	10
Martin v. Commissioner	73 T.C. C 255, 264 (1979)	13
Prater v. Commissioner	55 F. 3d 527, 529) (1 Oth Cir. 1995)	9
Whiting v. Commissioner	T.C. Summary Opinion 1987-109	9
Wright v. Commissioner	543 F. 2nd 593, 598 (7th Cir. 1983)	7
Yoakum v. Commissioner	82 T.C. 128, 140 (1984)	9

STATUTES AND RULES

	Page
10 USC 1408 (c) (l)	19
I.R.C. l041	19
I.R.C. 61	12
I.R.C. 61 (a)	12
I.R.C. 61 (a) (ll)	12
I.R.C. 71	12
I. R. C. 61 (a) (8)	12
N.C. GS 50-20	14
N.C. GS 50-20	14
NC GS 50-20 (b) (2)	14

MISCELLANEOUS

Tax Reform Act of l984 Publ. L 98-369 Stat. 494

Uniformed Services Frmer Spouses Protection Act (USFSPA) Opub. Lib. 907-252, 96 Stat 718, 730-738 (l982(

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 5, 2001.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 20, 2002, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

I. JURISDICTIONAL STATEMENT

On March 15, 2000, the Commissioner mailed a Notice of Deficiency pursuant to Sections 6212 and 6213(a) of the Internal Revenue Code (26 U.S.C.) ("the Code" or "I.R.C.") to Doris Neill Mozley (" Petitioner "), stating that deficiencies had been determined in Petitioner's federal income tax in the amounts of $964.00 for tax year 1995 and $3,442.00 for tax year 1996. (Doc. 10, Ex. 3-J)[1] On May 2, 2000, Petitioner filed a timely petition in the United States Tax Court (Doc. 1) contesting the Commissioner's determinations. *See* I.R.C. § § 6213(a) and 7502. The Tax Court had jurisdiction to consider the petition pursuant to I.R.C. § § 6213(a), 6214(a), and 7442.

On May 31, 2001, the Tax Court sustained the Commissioner's determination of deficiencies (Doc.17), unofficially reported at 81 T.C.M. (CCH) 1679 (Doc. 16) (Mozley v. Commissioner, No. 00-4865.

On June 18, 2001, within 90 days of entry of the decision, Petitioner filed her notice of appeal (Doc. 18). The appeal was timely under I.R.C. § 7483 and Fed.R.App.P. 13(a). This Court has jurisdiction over the appeal under I.R.C. § 7482.

---

[1] "Doc." references are to the documents comprising the original record on appeal as numbered by the Clerk of the Tax Court and transmitted to this Court, and identified in the Briefs previously submitted to this Court on behalf of Appellant and Appellee.

On December 5, 2001, a panel of this Court, (the Honorable Circuit Judges Widener, Niemeyer, and Williams), affirmed the decision of the Tax Court by unpublished per curiam opinion. Petitioner filed a timely Petition for Rehering in the 4th Circuit pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure which was denied on February 20, 2002, a copy of which order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE ISSUE

Whether the military retirement payments that Taxpayer received during the years at issue incident to her divorce were in the nature of alimony (taxable income to Petitioner), or in the nature of a property division and settlement (not taxable income to Petitioner).

BACKGROUND

Petitioner married Paul David Mozley, a career officer in the U.S. Navy Medical Corps, on June 15, 1952. Mr. Mozley retired from the Navy in 1975, and began receiving military retirement pension payments. Mr. Mozley and Petitioner were divorced by Judgment and Order of the District Court of Pitt County, North Carolina, entered April 19, 1983. The District Court's Order incorporated a written agreement ("Agreement") between Mr. Mozley and Petitioner concerning the division of their property as well as the amount of alimony Petitioner was to receive from Mr. Mozley. Pursuant to the Agreement, Petitioner was to receive one-half of Mr. Mozley's disposable military retirement pension pay until her

death, regardless of her marital status. The pertinent provisions of the Agreement are as follows (Doc. 10, Ex. 4-J):

> 8. In full and final settlement of all claims existing between the parties, and in particular, in full and final settlement of any claims that the plaintiff [Taxpayer] may have against the defendant [Mr. Mozley] for alimony pendente lite, alimony, and attorneys fees, and as a full and final property and marital settlement resolving all issues between the parties including equitable distribution of marital property, the parties do hereby stipulate, agree, contract and pray that the court order and enter as its mandate, the following:
>
> .....
>
> (i) The defendant shall pay to the plaintiff as alimony a sum equal to 22 percent of his salary that he actually receives *other than the retired/retainer pay that he receives by virtue of his retirement from the United States Navy*....(emphasis added).
>
> .....
>
> (1) [A]s additional alimony, the plaintiff shall receive a portion of the defendant's retired/retainer pay that he receives by virtue of his previous military service....The remaining pay.....shall be divided equally between the parties. The portion of this pay allotted to the plaintiff...shall be considered as alimony by the plaintiff and included by her in her taxable income...[The payments] shall continue on the 10th day of each month thereafter until the death of the plaintiff *regardless of her marital status*....(emphasis added).
>
> .....
>
> (n) All payments required to be made by the defendant to the plaintiff are intended to be payments of alimony and said payments of alimony shall be deductible by the defendant and taxable to the plaintiff on their federal and state income tax returns. The plaintiff shall declare said payments received as alimony and income to her on her tax returns.

(o) This agreement has been negotiated and executed on the assumption that the payments made by the defendant to the plaintiff or made on his behalf will be deductible by the defendant and taxable to the plaintiff. If, as a result of a final and binding judicial determination, or because of the subsequent change in the governing law or its authorizative [sic] interpretation, it is established that any or all of said payments will no longer be taxable to the plaintiff or deductible to the defendant, the provisions regarding alimony shall be subject to renegotiation. If the defendant and the plaintiff are unable to arrive at a mutually satisfactory readjustment of these provisions to take account of the changed tax impact, then the matter shall be submitted to a court for final and binding determination. Such renegotiatibility [sic] shall in no event effect [sic] the validity of the remaining provisions of this consent order and property settlement.

In August of 1996, the Agreement was amended pursuant to the above provision to allow Petitioner to receive the retirement payments directly from the Navy Finance Center in Cleveland, Ohio. During the years in issue, Petitioner received a total of $14,588.00 for 1995 and $13,880.00 for 1996.

REASONS FOR GRANTING THE PETITION

A.. The Tax Court erred by limiting its analysis solely to the labels assigned to the pension payments and the language in the Agreement.

It is undisputed that gross income includes amounts received as alimony or separate maintenance payments. *See* I.R.C. 61(a)(8) and 71(a), and that under Section 71 as it was in effect on the date of the Agreement a transfer of property between spouses is not treated as alimony for Federal income tax purposes. Hoover v. Commissioner, 102 F.3d 842, 844-845 (6th Cir. 1996), *affg.* Tax Memo. 1995-183. It is also not in dispute that a Court must treat the subject payments according to their substance and is not bound by the labels assigned to the payments by the parties to a separation agreement. Hesse v. Commissioner, 60 T.C. 685, 691 (1973), *affd. without published opinion* 511 F.2d 1393 (3d Cir. 1975), cert. denied, 423 U.S. 834 (1975), Wright v. Commissioner, 543 F.2d 593, 598 (7th Cir. 1983). Rather, the Court should examine the intent of the parties as to the true nature of the payments at issue, and the circumstances surrounding the decree or agreement. Hoover, *supra* at 845. The Tax Court acknowledged as much in its opinion. (T.C. Memo. 2001-125, p.7). Although weight and consideration should be given to the language and the structure of the Agreement in this case, that is not the only consideration that should be taken into account when determining the intent of the parties and the true nature of the payments.

Contrast Boucher v. Commissioner, 710 F.2d 507 (9th Cir. 1983) (where a clear state court decree existed that specifically defined the nature of the payments after a full trial and re-hearing, rather than an "ambiguous property settlement agreement which had been negotiated by the parties and incorporated into [the court's] final decree without a trial on the merits of the nature of the payments." Id. at 510. However, the Tax Court rested its opinion entirely on the language used in the Agreement and the structure of the Agreement to determine the intent of the parties and in reaching its conclusion that the retirement payments constituted taxable alimony (T.C. Memo. 2001-125, pp. 8-10).

The Agreement in this case, as incorporated into the final divorce decree, is not unambiguous. Section (8)(i) cited above specifically *exempts* Mr. Mozley's military retirement pay from the general alimony provision. The Agreement then contradicts itself by labeling the military retirement payments as "additional alimony" in a separate section. This is certainly not the clear Court decree (or property settlement agreement) which was contemplated in the Boucher case, *supra.*

Faced with a contradictory written Agreement, the Tax Court should have at least moved beyond the face of the Agreement and analyzed the factors set forth in Beard v. Commissioner, discussed hereinbelow, to examine the true character of

the payments at issue, rather than relying solely upon the labels assigned to said payments by the parties to the divorce.

B. The Tax Court mistakenly applied North Carolina law to the instant case.

Although the characterization of payments as either alimony or a property settlement, and the federal tax consequences thereof, is ultimately a question of federal rather than state law (*See* Prater v. Commissioner, 55 F.3d 527, 529)(10th Cir. 1995), the Tax Court acknowledged that it also has frequently looked to state law in considering whether payments between spouses constitute taxable alimony or a non-taxable property settlement (T.C. Memo. 2001-125, p.7, *citing* Yoakum v. Commissioner, 82 T.C. 128, 140 (1984). *See also* Whiting v. Commissioner, T.C. Summary Opinion 1987-109 and Ficchi v.Commissioner, 51 T.C.M. (CCH) (1986). This is especially important where, as noted in Boucher, 710 F.2d at 512, a property settlement agreement is incorporated by a state court without an independent adjudication as to the characterization of the property.

Although North Carolina Law did not recognize military retirement pay as "marital property" at the time of Petitioner's divorce (*See* N.C. Gen. Stat. § 50-20(b)(2), 50-20(a) 1981), North Carolina did allow the parties to a divorce to *agree* to treat same as marital property and to distribute same accordingly incident to the divorce:

> Before, during or after marriage, the parties may, by written agreement, duly execute and acknowledge in accordance with the provisions of GS 50-20, or by written agreement valid in the jurisdiction where executed, provide for the distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding upon the parties. (N.C. Gen. Stat. § 50-20(d)) Hoolapa v. Hoolapa, 105 N.C. App. 230, 412 S. E. 2d 112 (Ct. of App. 1992)

According to the aforesaid North Carolina statute, the parties' decision to classify property which would otherwise be separate as marital and to distribute it accordingly is a binding transmutation of the nature of such property for the purposes of the specific case. Whether or not at the time of Taxpayer's divorce a North Carolina court could *compel* distribution of the subject military retirement is immaterial to this case. The fact is that the parties chose to treat Mr. Mozley's military retirement as a marital property asset for all purposes in the specific case, as they were authorized to do, and the North Carolina court appropriately gave legal and binding effect to that classification.

Although the Tax Court placed great emphasis on the intent of the parties (T.C. Memo. 2001-125, p. 7, citing Hoover, *supra*), it disregarded Mr. Mozley and Petitioner's intent to treat Mr. Mozley's property interest in his military retirement pension as a divisible marital asset as manifested by their Agreement. Again, this intent should have been taken into account and considered under the factors of the Beard test, which is discussed below.

C. The Tax Court erred in disregarding the test set forth in *Beard v. Commissioner*, 77 T.C. 1275 (1981).

When the following factors[2], set forth in Beard v. Commissioner, 77 T.C. 1275 (1981), are applied to the subject military retirement payments Taxpayer received, it becomes apparent that the payments are in the form of a property settlement, not alimony:

Factor 1: That the parties in their agreement (or the court in its decree) intended the payments to effect a division of their assets;

As noted above, the parties elected to treat the payments as marital property when they were not otherwise required to do so, and the payments, although summarily labeled "alimony" in the agreement, were in fact set forth and described in a separate section apart from the central provisions of the Agreement providing for alimony. In addition, Petitioner 's testimony in the Tax Court indicated that she was advised to designate the payments as "alimony" simply to technically allow for their enforcement through the contempt power of the Circuit Court (Hearing Transcript, p. 13). No evidence was offered in the Tax Court to contradict Petitioner's testimony that she did not intend the payments to be considered alimony for tax purposes. In light of the ambiguity and the

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[2] The factors are designated herein by the number assigned to them in the Beard opinion, 77 T.C. at 1284-85.

uncontradicted testimony concerning Petitioner's intent, the designation as "alimony" becomes a matter of mere labeling, to which the Court is not bound. Dr. Mozley's clear intent that he wished to share the military pension as "property" with his wife of 30 years is shown in a letter dated October 18, 1981, which he wrote to the then Chairman of the House Armed Services Committee, The Honorable Melvin Price, in which he urged passage of The Former Spouses Protection Act which would allow the division of military pensions and which would give "my wife a pro-rata share of my pension....I feel that she earned all the Navy retirement benefits as well as I did."

Factor 2: Whether the recipient surrendered valuable property rights in eachange for the payments.

North Carolina statute allowed the parties to work out their own property agreement. Both parties were represented by competent lawyers. The agreement represents what they deemed "fair" in the division of their joint property.

Factor 3: That the payments are fixed in amount and not subject to contingencies, such as death or remarriage of the recipient;

The payments are fixed in amount under the terms of the Agreement and not subject to remarriage (as alimony often is by operation of law) or any other contingency save for the death of Captain Mozley or the termination of the payments by the US Government (Doc 10,. Ex. 4-J, p.9) (This is true of all military pensions awarded as "property" where there is no question about their classification.)

Factor 4: Whether the payments are secured.

The payments are secured by the full faith and credit of the US Government.

Factor 5: Whether the payments plus other property is equal to 1/2 of the total property accumulated by the parties.

The parties, represented by competent lawyers, were in agreement that the division was fifty-fifty.

Factor 6: That the need of the recipient was not taken into consideration in determining the amount of the payments.

On the face of the Agreement, it is clear that Taxpayer's financial needs were not taken into account when determining either the amount or the duration of the pension payments. Unlike alimony, where remarriage to a potentially wealthy spouse is a central consideration, no contingency exists in the Agreement which takes third party support of Taxpayer into account.

Factor 7: That a separate provision for support was provided elsewhere in the decree or agreement:

It is clear from the Agreement that, despite the labels assigned to the subject payments, the provision providing for the military retirement payments is set forth in a separate, distinct section of the Agreement, further indicating that the payments are in the nature of a division of property.

Martin v. Commissioner, 73 T.C. 255, 264, (1979) states that : *When the parties themselves differentiate among payments to be made under a*

divorce settlement by pl ·ng them in different portions of the ·reement and making them subject to different ıerms, it is proper for a court to also ɑ.cord them different tax treatment.

In the *Beard* case supra the court observed that one of the ways to determine whether a series of payments is property is whether support was provided elsewhere in the decree as was true in the instant case.

Upon proper analysis, the presence of all of the seven criteria from the *Beard* case indicates that the payments at issue are a division of property, and should be accorded tax-free treatment by the I.R.S.

Subsequent to the passage of the Former Spouses Protection Act (10 USC 1408) (c) (1) which allowed states to divide military pension as property in divorce settlements and the passage of the Tax Reform Act of 1984 (Sec. 1041), which permitted the transfer of property incident to divorce to be transferred on a tax-free basis, there have been many contradictory rulings on whether an ex-spouse's military pension share is tax free as 1041 provides, or whether even if labeled "property" it is nevertheless taxable as pension income as an ex-spouse receives it. Depending on the judge, the court, the state, the jurisdiction, or the IRS appeals office, the answer to the tax liability question for the ex-spouse is often very different on the same set of facts and circumstances. Rulings have come down on both sides with identical pension characteristic and often IRS Appeals Offices and courts have overturned previously settled cases. For example, in the present case, this Petitioner was granted a tax free status for her ex-spouse pension share in 1994 when senior Appeals Officer, Ms. Estelle Robbins, of the Richmond Appeals Office with the concurrence of the Chief of the Richmond Appeals Office, Mr. George Gretes, ruled that .the pension share Petitioner receives each month from Navy Finance incident to her divorce is "property" and therefore passes tax-free.

The "property" designation for Petitioner's share was subsequently overturned May 30, 2001, T.C. Memo 2001-125 when the court ruled that it was "alimony" based only on what it was called in the divorce agreement. Petitioner had relied on Ms. Robbins' ruling, a senior and experienced I.R.S. examiner. There was no *res judicata* considered by the Tax Court. The Tax Court summarily changed the pension share category from "property" to "alimony." although Petitioner's share had all the characteristics of "property" as enumerated in the Beard case for determining whether a payment is "property" or "alimony."

One of the cases that tax courts have relied on to tax military pension shares transferred incident to divorce is that of Eatinger. In 1990 Judge Dawson re-opened this divorce case more than a decade after it was finalized to reduce . Mrs. Eatinger's share to "disposable" based on the Former Spouses Protection Act passed six years after Mrs. Eatinger's divorce was finalized in which he erroneously believed limited a wife's share to "disposable" income as defined in that Act and ruled also that she owed income tax based on the fact that it was pension income although previously it had been considered "tax-free." Since the Eatinger case many tax courts have used that case as a precedent. For examples, Mess (Feb.7, 2000, Porter, October 23, 1996, Denbow 1989-92, and others.

In the Balding case the Tax Court overturned an IRS Letter ruling 8813023 that concluded that the cash payments which Mrs. Balding received in settlement of her community property claim was taxable income. The Tax Court (Balding v Commissioner 98 TC 368 (1992). overruled the Internal Revenue Service and made it

clear that it intended to hold the IRS to the spirit and letter of the law of IRC Sec. 1041.

The above are but a few examples of the confusion about transfers of property incident to divorce and how different results obtain on similar circumstances in different courts and IRS Appeals Offices.

It is urgent that the Supreme Court of the United States rule on the issue of whether military pension shares incident to a divorce are tax-free transfers of property in order to cut down the number of cases that have been appealed on this issue and to settle once and for all what the criteria of property transfers are so that every woman in the United States can be treated equally in all courts.

CONCLUSION

It is evident from the transcript that the Tax Court refused not only to move beyond the labels assigned to the military retirement payments, but also refused to address the issue of whether or not payments from a militry retirement pension are taxable to an ex-spouse (Hearing Transcript, p. 20). Petitioner-Appellant's receipt of a portion of her former husband's military retirement pay incident to her divorce constitutes a nontaxable division of property. The petition for a writ of certiorari should be granted.

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3 Despite this common characteristic of pension payments (i.e., terminable upon death of the payor), Taxpayer asserts that the military retirement payments at issue have nevertheless are non-taxable transfers of property incident to a divorce. See I.R.C. 61(a) and 1041 (a) and (b).

TABLE OF AUTHORITIES CITED

CASES

		Page
Balding v. Commissioner	Docket No 10108 TC 368 Filed March 31, 1992	15
Beard v. Commissioner	77 T.C.1275 (1981)	11
Boucher v. Commissioner	710 F. 2d 507 (9th Cir. 1983)	8
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Prater v. Commissioner	55 F. 3d 527, 529) (1 Oth Cir. 1995)	9
Whiting v. Commissioner	T.C. Summary Opinion 1987-109	9
Wright v. Commissioner	543 F. 2nd 593, 598 (7th Cir. 1983)	7

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States Tax Court appears at Appendix C.

( ) reported at _____; or

( ) has been designated for publication but is not yet reported; or,

(X) is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 20, 2002

No. 01-1830
00-4865

DORIS NEILL MOZLEY

Petitioner - Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent - Appellee

ORDER

The appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

01-1830

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
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February 20, 2002

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Re: 01-1830 Mozley v. Commissioner, IRS
00-4865

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

/s/ Pamela K. Stump
By: _____
Deputy Clerk

Enclosure(s)

Appendix B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1830

DORIS NEILL MOZLEY,

Petitioner - Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent - Appellee.

Appeal from the United States Tax Court. (Tax Ct. No. 00-4865)

Submitted: November 29, 2001 Decided: December 5, 2001

Before WIDENER, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Doris Neill Mozley, Appellant Pro Se. David English Carmack, Janet A. Bradley, Tamara Wenda Ashford, Paula Marie Junghans, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Stuart L. Brown, Richard W. Skillman, INTERNAL REVENUE SERVICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Doris Mozley appeals from the tax court's order determining deficiencies with respect to her 1995 and 1996 federal income tax liability. Our review of the record and the tax court's opinion discloses no reversible error. Accordingly, we affirm on the reasoning of the tax court. Mozley v. Commissioner, No. 00-4865 (U.S. Tax Ct. May 31, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

December 5, 2001

TO: Tamara Wenda Ashford, Esq.
Janet A. Bradley, Esq.
David English Carmack, Esq.
Richard W. Skillman, Esq.
Stuart L. Brown, Esq.
Paula Marie Junghans, Esq.
Doris Neill Mozley

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 01-1830

The Court's decision is enclosed.

PETITION FOR REHEARING (FRAP 40)
PETITION FOR REHEARING EN BANC (FRAP 35)

Filing Time

A petition must be received in the clerk's office within 14 days after judgment to be timely. There are three exceptions to this rule:

(1) In all civil cases in which the United States or an agency or officer thereof is a party, the time within which a party may seek rehearing shall be 45 days after entry of judgment.

(2) The Court may grant an extension of time or leave to file a petition for rehearing out of time if the party establishes that the delay resulted from the death or serious illness of counsel or a family member (or of a party or family member in pro se cases) or other circumstances wholly beyond the control of counsel or a party proceeding without counsel.

(3) Prisoner petitions are deemed filed when delivered to prison authorities.

If a petition for rehearing en banc is to be filed, it must be filed at the same time and in the same document as the petition for rehearing and must be clearly identified in the title.

Each case number to which the petition applies must be listed on the petition, even in companion or consolidated cases. Failure to list the individual case numbers on the petition will result in the unidentified cases proceeding to mandate even if a timely petition for rehearing has been filed in a companion or consolidated case.

A timely filed petition for rehearing or petition for rehearing en banc will stay the mandate and toll the running of time for filing a petition for writ of certiorari.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was

submitted and which was overlooked by the panel.
3. The opinion is in conflict with a decision of the United States Supreme Court, this Court, or another court of appeals, and the conflict is not addressed in the opinion.
4. The proceeding involves one or more questions of exceptional importance.

Statement of Counsel — A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose" section. The points to be raised shall be succinctly listed in the statement.

Form — The 15 page limit allowed by the Rule shall be observed. The Court requires 4 copies of the petition (20 copies of a petition for rehearing en banc); however, a pro se party who is indigent may file the original only.

BILL OF COSTS (FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs on or before 12/19/01.

MANDATE (FRAP 41)

Issuance Time — Except in original proceedings before this Court when there is no mandate, the mandate is issued 7 days after the expiration of the time for filing a petition for rehearing. A timely petition for rehearing, petition for rehearing en banc, or motion to stay the mandate will stay the issuance. If the petition or motion is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay — A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

CRIMINAL JUSTICE ACT

CJA — Counsel appointed under the Criminal Justice Act must file their vouchers no later than 60 days after final disposition of the case. If no petition for certiorari is filed, the 60 days runs from the date of judgment. If a petition for certiorari is filed, the 60 days runs from the date of filing the petition.

PETITION FOR WRIT OF CERTIORARI (Sup.Ct.R. 13)

Filing Time — Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. The petition must be filed in the United States Supreme Court within 90 days of this Court's entry of judgment. The time does not run from the issuance of the mandate. If a petition for rehearing is timely filed, the time runs from the denial of that petition. Content, fees, and number of copies of a petition for writ of certiorari are governed by the Rules of

the United States Supreme Court.

PATRICIA S. CONNOR
CLERK

Appendix C

T.C. Memo. 2001-125

UNITED STATES TAX COURT

DORIS NEILL MOZLEY, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 4865-00. Filed May 30, 2001.

Doris Neill Mozley, pro se.

Timothy B. Heavner, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

JACOBS, Judge: Respondent determined deficiencies in petitioner's Federal income taxes of $964 for 1995 and $3,442 for 1996.

The issue for decision is whether petitioner's receipt of a portion of military retirement pay to which petitioner's former husband otherwise was entitled constitutes receipt of taxable: (1)

SERVED MAY 30 2001

Alimony pursuant to sections 61(a)(8) and 71; or, in the alternative, (2) pension income pursuant to section 61(a)(11).

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue.

FINDINGS OF FACT

Some of the facts have been stipulated and are found accordingly. The stipulation of facts and the attached exhibits are incorporated herein by this reference.

Background

Petitioner resided in Richmond, Virginia, at the time she filed her petition. She timely filed Federal income tax returns for 1995 and 1996.

On June 15, 1952, petitioner married Paul David Mozley. Mr. Mozley served in the U.S. Navy Medical Corps for 20 years and retired in 1975. Upon his retirement, Mr. Mozley began receiving military retirement payments.

The Agreement

In April 1983, petitioner and Mr. Mozley divorced. They reached an agreement (the agreement) concerning the division of their property as well as the amount of alimony petitioner was to receive. Pursuant to the agreement, petitioner was to receive one-half of Mr. Mozley's disposable military retirement pay until her

death, regardless of her marital status. Both petitioner and Mr. Mozley were represented by counsel during the course of their divorce proceedings.

The District Court of Pitt County, North Carolina (the district court), adopted the agreement as part of its April 19, 1983, Judgment and Order (the April 1983 Judgment). The portions of the April 1983 Judgment, as relevant to the issue before us, provide as follows:

> 8. In full and final settlement of all claims existing between the parties, and in particular, in full and final settlement of any claims that the plaintiff [petitioner] may have against the defendant [Mr. Mozley] for alimony pendente lite, alimony, and attorney's fees, and as a full and final property and marital settlement resolving all issues between the parties including equitable distribution of marital property, the parties do hereby stipulate, agree, contract, and pray that the court order and enter as its mandate, the following:
>
> * * * * * * *
>
> (i) The defendant shall pay to the plaintiff as alimony a sum equal to 22 percent of his salary that he actually receives other than the retired/retainer pay that he receives by virtue of his retirement from the United States Navy. * * *
>
> * * * * * * *
>
> (l) * * * As additional alimony, the plaintiff shall receive a portion of the defendant's retired/retainer pay that he receives by virtue of his previous military service. * * * The remaining pay * * * shall be divided equally between the parties. The portion of this pay allotted to the plaintiff * * * shall

be considered as alimony by the plaintiff and included by her in her taxable income. * * * [These payments] shall continue on the 10th day of each month thereafter until the death of the plaintiff regardless of her marital status * * *

* * * * * * *

(n) All payments required to be made by the defendant to the plaintiff are intended to be payments of alimony and said payments of alimony shall be deductible by the defendant and taxable to the plaintiff on their federal and state income tax returns. The plaintiff shall declare said payments received as alimony and income to her on her tax returns.

(o) This agreement has been negotiated and executed on the assumption that the payments made by the defendant to the plaintiff or made on his behalf will be deductible by the defendant and taxable to the plaintiff. If, as a result of a final and binding judicial determination, or because of the subsequent change in the governing law or its authorizative [sic] interpretation, it is established that any or all of said payments will no longer be taxable to the plaintiff or deductible to the defendant, the provisions regarding alimony shall be subject to renegotiation. If the defendant and the plaintiff are unable to arrive at a mutually satisfactory readjustment of these provisions to take account of the changed tax impact, then the matter shall be submitted to a court for final and binding determination. Such renegotiatibility [sic] shall in no event effect [sic] the validity of the remaining provisions of this consent order and property settlement.

In August 1996, petitioner and Mr. Mozley amended the agreement (the amended agreement), and the district court entered a Memorandum of Order, incorporating the amended agreement. In relevant part, this order stated:

10.(b) [The payment to petitioner of half of her former spouse's military retirement pay should continue as agreed] except that the plaintiff shall receive the payment directly from the Navy in the

> manner presently being paid by the Navy and the parties agree that this arrangement shall continue without protest by the parties regarding the method used by the Navy to compute the amount paid to the plaintiff, subject to the 15% limitation for disability portion of the Navy retirement.

From August 1983 through the date of trial (January 8, 2001), petitioner received a portion of Mr. Mozley's military retirement pay from the Navy Finance Center in Cleveland, Ohio.

During the years in issue, petitioner received a total of $14,588 for 1995 and $13,880 for 1996, as her share of Mr. Mozley's military retirement pay.

Petitioner's Returns

Petitioner reported her share of Mr. Mozley's military retirement pay as income on her Federal income tax returns for 1983 through 1990; she did not do so for 1991 through 1999.

Notice of Deficiency

In the notice of deficiency, respondent determined that the military retirement payments petitioner received in 1995 and 1996 constituted taxable alimony to her.

OPINION

We first decide whether the military retirement payments petitioner received during the years in issue constituted taxable alimony, as respondent contends, or a nontaxable division of property, as petitioner maintains.

Gross income includes amounts received as alimony or separate

maintenance payments. See secs. 61(a)(8), 71(a). At the time of petitioner's divorce in 1983, section 71 provided:

> If a wife is divorced or legally separated from her husband under a decree of divorce * * *, the wife's gross income includes periodic payments * * * received after such decree in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

Section 71 was amended by the Deficit Reduction Act of 1984 (DEFRA 1984), Pub. L. 98-369, sec. 422(a), 98 Stat. 494, 795. However, DEFRA 1984 is applicable only to divorce instruments executed after December 31, 1984, or modified after December 31, 1984, where the modified instrument states that the amended version of section 71 will apply. See DEFRA 1984, supra at 798. Here, the agreement was entered in April 1983 and the modified agreement was entered in August 1996. The amended agreement neither modified the description or terms (i.e., the amount and frequency) of the alimony payments nor expressly provided that amended section 71 was applicable. Thus, we apply former section 71 to determine whether the military retirement payments petitioner received constitute alimony.

Pursuant to former section 71, only payments in the nature of maintenance or support (as opposed to a transfer of property between spouses) are treated as alimony for Federal income tax purposes. See, e.g., Hoover v. Commissioner, 102 F.3d 842, 844-845 (6th Cir.

1996), affg. T.C. Memo. 1995-183. In determining whether payments constitute alimony or a division of property, we are not bound by the labels assigned to the payments by the parties in their agreement. See Hesse v. Commissioner, 60 T.C. 685, 691 (1973), affd. without published opinion 511 F.2d 1393 (3d Cir. 1975). On the other hand, in deciding the character of an award in a divorce or separation decree, we give great weight to the language and structure of the decree. See, e.g., Griffith v. Commissioner, 749 F.2d 11, 13 (6th Cir. 1984), affg. T.C. Memo. 1983-278. Whether payments represent support or a property settlement is a question of the parties' intent. See Hoover v. Commissioner, supra at 845. We ascertain this intent not only from the underlying agreement but from the particular facts and circumstances involved. See, e.g., Boucher v. Commissioner, 710 F.2d 507, 509 (9th Cir. 1983), affg. T.C. Memo. 1981-258.

This Court has frequently looked to State law in considering whether payments between spouses constitute alimony or a property settlement. See Yoakum v. Commissioner, 82 T.C. 128, 140 (1984). Here, the applicable State law is that of North Carolina, and we therefore look to the law of that State. Under North Carolina law (as existing at the time of petitioner's divorce), military retirement pay was the separate property of the spouse who had served in the military (here, Mr. Mozley) and was not subject to

division or distribution by a court.[1] See N.C. Gen. Stat. secs. 50-20(b)(2), 50-20(a) (1981). Thus, as applicable to the instant situation, even though the district court lacked authority to order a division of Mr. Mozley's military retirement pay, Mr. Mozley had the ability to divide his retirement payments with petitioner; and in fact, he agreed to do so pursuant to paragraph 8(l) of the agreement.

On the basis of the clear and unambiguous language of the agreement and amended agreement, we conclude that the payments to petitioner should be characterized as alimony. We reach this conclusion based on the following. First, the agreement characterizes the payments in question as "alimony" and contains other provisions that specifically relate to the division of the parties' property.[2] Second, the agreement specifically provides that the payments in question are "intended to be payments of alimony". Third, the agreement specifically states that the payments are to be taxable to petitioner and deductible by Mr.

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[1] After the entry of petitioner's divorce, North Carolina amended its law, effective Aug. 1, 1983, to treat military retirement pension as marital property, thus subjecting military retirement to a Court's equitable distribution authority. See N.C. Gen. Stat. sec. 50-20 (1999); Morris v. Morris, 339 S.E.2d 424 (N.C. Ct. App. 1986).

[2] We are mindful that par. 8(l), which refers to the payment of one-half of Mr. Mozley's military retirement payments as "additional alimony" to petitioner, closely followed par. 8(i), which discusses "alimony". Reading these paragraphs in tandem supports our conclusion that the payments at issue constitute alimony.

Mozley. Fourth, the agreement states that if the intended tax consequences of the payments (i.e., taxable to petitioner; deductible by Mr. Mozley) were judicially altered, the amount to be paid to petitioner would become subject to renegotiation.

The language of the agreement is unambiguous; it contains express direction that the military retirement payments petitioner is to receive constitute alimony. These payments were (1) periodic; (2) received after a decree in discharge of a legal obligation; and (3) because of the marital or family relationship, imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation. See Brodersen v. Commissioner, 57 T.C. 412, 415-416 (1971).

Both petitioner and Mr. Mozley were represented by counsel. There is nothing in the record to indicate that the agreement was negotiated other than at arm's length. We therefore assume that the parties considered their respective tax obligations.

To conclude, considering all of the facts and circumstances herein, we hold that the military retirement payments petitioner received during the years in issue were in the nature of alimony and thus constitute taxable income to her.

In light of this holding, we need not address the issue of whether the retirement payments constitute pension income.

We have considered all arguments raised by petitioner and find them to be without merit. Moreover, we have reviewed all cases cited by petitioner and find them either distinguishable or in accord with the conclusion reached herein.

To reflect the foregoing,

Decision will be entered for respondent.